

BEFORE  
THE PUBLIC SERVICE COMMISSION OF  
SOUTH CAROLINA  
DOCKET NO. 2000-0237-E - ORDER NO. 2000-997  
DECEMBER 13, 2000

IN RE: Borg-Warner Automotive Fuel Systems Corporation,	)	
	)	
	)	
Complainant/Petitioner,	)	ORDER DENYING
	)	PETITION FOR
vs.	)	RECONSIDERATION
	)	AND/OR REHEARING
Duke Power,	)	
	)	
Respondent/Defendant.	)	

**INTRODUCTION**

This matter comes before the Public Service Commission of South Carolina ("Commission") on the Petition for Reconsideration and/or Rehearing filed by Duke Power, a division of Duke Energy Corporation ("Duke"). By its Petition, Duke seeks reconsideration and/or rehearing of Commission Order No. 2000-816 in which the Commission denied Duke's Motion to Dismiss in the above-referenced complaint.

The instant docket was initiated by a Complaint filed by Borg-Warner Automotive Fuel Systems Corporation ("Borg-Warner") against Duke. Borg-Warner's Complaint alleged that Duke threatened Borg-Warner with termination of service if Borg-Warner did not install certain equipment at Borg-Warner's expense. Borg-Warner filed its Complaint and requested a determination of whether Borg-Warner or Duke should bear the cost of the equipment.

Thereafter, Duke filed a Motion to Dismiss the Complaint. The Motion to Dismiss was set for oral argument before the Commission. Oral arguments were held before the Commission, and subsequently, Order No. 2000-816 was issued in which the Commission denied the Motion to Dismiss. Duke then filed the Petition for Reconsideration and/or Rehearing, which is presently before the Commission. By its Petition, Duke asserts two main arguments for its requested reconsideration.

First, Duke asserts that Borg-Warner did not allege, within the “four corners” of the Complaint, a legal basis which would require Duke to pay money damages to Borg-Warner and further that the Commission improperly relied upon matters outside the Complaint in its decision. (Petition, p. 3, ¶ 3.) Second, Duke asserts that the Commission applied an incorrect legal standard in ruling on Duke’s Motion to Dismiss under Rule 12(b)(1) for lack of jurisdiction over subject matter. (Petition, p. 4-5, ¶ ¶ 4-5.) For the reasons discussed below, the Commission denies Duke’s Petition.

#### **DUKE’S FIRST ALLEGATION OF ERROR**

By its Petition, Duke first asserts that Borg-Warner did not allege, within the “four corners” of the Complaint, a legal basis which would require Duke to pay money damages to Borg-Warner. (Petition, p. 3, ¶ 3.) Within the paragraph where Duke alleges this first argument, Duke also contends that the Complaint of Borg-Warner seeks money damages and that the Commission did not adequately address Duke’s contention. (Petition, p. 3, ¶ 3.) Finally, Duke asserts that the Commission improperly relied upon matters outside of the “four corners” of Borg-Warner’s Complaint in reaching the decision to deny the Motion to Dismiss. (Petition, p. 3, ¶ 3.)

In Order No. 2000-816, the Commission set forth, paragraph by paragraph, the allegations of Borg-Warner's Complaint. (Order No. 2000-816, pp. 6-7.) Upon reviewing the allegations contained in the Complaint, the Commission, after considering the facts as alleged and in the light most favorable to Borg-Warner, the non-moving party, found that the Complaint stated facts sufficient to state a cause of action. The Commission found that Borg-Warner, by its Complaint, alleged that it purchased and was installing a VAR compensator under threat of termination of electrical service. (Order No. 2000-816, p. 7.) This allegation is contained in Borg-Warner's Complaint at p. 3, ¶ 13. The Commission further found "that a Complaint alleging action taken and expenditures of money to purchase equipment to avoid termination of service is a matter that falls within the jurisdiction of the Commission." (Order No. 2000-816, p. 8.)

Duke asserts that the Commission improperly relied on matters outside "the four corners" of Borg-Warner's Complaint. (Petition, p. 3, ¶ 3.) In making this allegation, Duke cites to Order No. 2000-816 at page 4, paragraph 2 which states:

Borg-Warner filed a Response to Motion to Dismiss and by its Response and its oral argument asserts that its Complaint has alleged a prima facie claim against Duke. Borg-Warner asserts that "it is not necessary to offer proof of this claim in connection with the assertion of allegations in a complaint." Response to Motion to Dismiss, ¶ 1. Further, Borg-Warner offers that its Complaint alleges that Duke has demanded that Borg-Warner incur expenses for the acquisition and installation of equipment under threat of termination of electrical services and that such practices of a regulated utility are matters appropriately before the Commission. Response to Motion to Dismiss, ¶ 2-4.

The offending paragraph, quoted above, which Duke cites in support of its position that the Commission improperly relied on matters outside the "four corners" of

Borg-Warner's Complaint is contained in the portion of Order No. 2000-816 captioned "Positions of the Parties." There can be no dispute that Borg-Warner filed a Response to the Motion to Dismiss and that the Commission entertained oral arguments on the Motion to Dismiss. It is not error for the Commission to reference in its order what transpired during a proceeding.

Further, Duke alleges "[t]he Commission's Order shows that the Commission improperly considered the Oral Argument of Borg-Warner's Counsel" on page 9, ¶ 1 of Order No. 2000-816 where the Order states "[a]t oral argument, Borg-Warner phrased the question before the Commission as between the utility and the customer who should bear the expense of the VAR compensator." (Petition, p. 3, ¶ 3.) The quoted sentence comes from the portion of Order No. 2000-816 where the Commission made its finding that it has subject matter jurisdiction over the subject matter of the Complaint. By its Complaint, Borg-Warner used the word "indemnify" in stating its prayer for relief. (Complaint, p. 3.) Clearly, from the use of the word "indemnify" in the Complaint, Borg-Warner seeks a ruling on which entity, the utility or the customer, should bear the costs related to the purchase and installation of the VAR compensator. The Complaint states that Borg-Warner has ordered the VAR compensator at a certain price and states the amount that Borg-Warner will spend to install the VAR compensator. (Complaint p. 3, ¶ 14.) In seeking indemnification of these costs, it is clear to the Commission that Borg-Warner seeks that the Commission determine who should bear the expense of the VAR compensator with the attendant installation costs. We find no error in the language used in Order No. 2000-816. While the language used in Order No. 2000-816 may be the

language used by counsel at the oral argument, that interpretation is apparent from the face of the Complaint.

Duke also alleges that Order No. 2000-816 did not adequately address Duke's contention that Borg-Warner was simply seeking money damages. The Commission finds Duke's allegation to be without merit. In Order No. 2000-816, the Commission found that it has subject matter jurisdiction over the subject matter of the Complaint. (Order No. 2000-816, ¶ 3, pp. 8-10.) In making this finding, the Commission acknowledged that "[t]he matter before the Commission is a determination of whether it is the obligation of the utility or the customer to provide the equipment being required by the utility." (Order No. 2000-816, p. 9.) This conclusion is apparent from the face of the Complaint where the Complaint seeks indemnification of the costs of purchase and installation of the VAR compensator.

Duke further asserts that Borg-Warner's request for indemnification is a civil matter outside the jurisdiction of the Commission and that later attempts to change the character of the relief sought are inappropriate (Petition, p. 3, ¶ 3.) The Commission has not changed the character of the relief sought. Clearly, by its Complaint, Borg-Warner seeks reimbursement of the costs associated with the VAR compensator. And just as clearly, a determination of who should bear those costs must be made in reaching a determination of whether indemnification is appropriate. The Commission has not changed the character of Borg-Warner's request; Duke simply does not like the Commission's ruling.

Duke also takes exception to the Commission citing to Reg. 103-363(1)(C). (Petition, p. 4, ¶ 3.) In asserting error by the Commission, Duke states “Reg. 103-363(1)(C) does not appear anywhere on the face of Borg-Warner’s Original Complaint. This is important because Reg. 103-363(1)(C) is the basis upon which this Commission relies to find jurisdiction to award money damages to Borg-Warner.” (Petition, p. 4, ¶ 3.) In Order No. 2000-816 in the Commission’s discussion on subject matter jurisdiction, the Commission referred to certain Commission regulations, including Reg. 103-363, and the Commission concluded that “for purposes of the Rule 12(b)(1) Motion, these regulations illustrate that matters involving which party should bear the cost of certain equipment falls within the jurisdiction of the Commission.” (Order No. 2000-816, p.10.) The point of the illustration is that certain Commission regulations address which party should bear the costs associated with certain equipment. Thus contrary to Duke’s assertions, the Commission possesses subject matter jurisdiction to determine which party should bear the costs of certain equipment.

Duke continues to characterize the relief sought by the Complaint as “money damages.” A careful reading of the Complaint as explained in Order No. 2000-816, and reaffirmed herein, reveals that the Complaint seeks a determination of whether the utility or the customer should bear the costs of additional equipment required to service the customer. The Commission finds no error with its determination that the Complaint sets forth a cause of action which this Commission has jurisdiction to hear.

**DUKE'S SECOND ALLEGATION OF ERROR**

As its second main argument for reconsideration, Duke asserts that the Commission applied an incorrect legal standard in ruling on the Motion to Dismiss under Rule 12(b)(1). (Petition, p. 4-5, ¶¶ 4-5.) Duke asserts in its Petition that when this matter was presented to the Commission for a decision, the Commission was informed that the standard applicable to a 12(b)(6) Motion to Dismiss for failure to state a cause of action, that standard being that all doubts and reasonable inferences are to be construed in the light most favorable to the non-moving party, was also applicable to a 12(b)(1) Motion to Dismiss for lack of subject matter jurisdiction. The Commission agrees that the standard of a 12(b)(6) Motion to Dismiss for failure to state a cause of action is not applicable to a 12(b)(1) Motion to Dismiss for lack of subject matter jurisdiction. The Commission agrees that the applicable standard is a matter of law for the Commission. See, Woodard v. Westvaco Corporation, 315 S.C. 329, 433 S.E.2d 890 (Ct.App. 1993).

Duke asserts that the applicable statute of limitations in this matter had expired prior to Borg-Warner filing its Complaint on May 11, 2000. In support of its position, Duke relies upon a Customer Inquiry Form, attached to its Motion to Dismiss as Exhibit A, which Duke asserts shows that Borg-Warner's predecessor in interest complained on April 22, 1997, of problems with electric service which was provided by Duke. Duke further alleges that this Customer Inquiry Form "proves" that the statute of limitations began to run on April 22, 1997. Borg-Warner's Complaint alleges that it became aware of problems in or about May 1999 when Duke informed Borg-Warner of complaints from customers down-line from Borg-Warner. (Complaint, p. 3, ¶ 13.)

In Order No. 2000-816, the Commission found that Borg-Warner's "Complaint should not be dismissed pursuant to Duke's argument that the statute of limitations has expired." (Order No. 2000-816, p. 10, ¶ 4.) The Commission further stated "[w]hile the determination of when the statute of limitations began to run will need to be determined, the Commission finds there is not sufficient evidence before it to make that determination of when the statute of limitations commenced ... [o]f course, Duke is free to plead the expiration of the statute of limitations as an affirmative defense to this matter when it files its Answer to the Complaint." (Order No. 2000-816, p. 10, ¶ 4.)

To the extent that it appeared that the Commission may have relied upon an incorrect standard in ruling on this portion of Duke's Motion to Dismiss in Order No. 2000-816, the Commission acknowledges that the correct standard to apply to a Rule 12(b)(1) Motion to Dismiss for lack of subject matter jurisdiction is a matter of law to be determined by the court, or in this case the Commission, and not the standard applicable to a 12(b)(6) Motion to Dismiss for failure to state a cause of action wherein all doubts and reasonable inferences are to be construed in the light most favorable to the non-moving party. See, Dye v. Gainey, 320 S.C. 65, 463 S.E.2d 97 (Ct.App. 1995).

However, the Commission finds no error in denying Duke's Motion to Dismiss under Rule 12(b)(1). By its Motion to Dismiss, Duke attempts to raise the question of subject matter jurisdiction by asserting the defense of the statute of limitations. In McLendon v. South Carolina Department of Highways and Public Transportation, 313 S.C. 525, 443 S.E.2d 539 (1994), the Supreme Court of South Carolina held that the "appellant's assertion that its motion presenting a statute of limitations defense raises a



question of subject matter jurisdiction is without merit.” In Glenn v. School District No. Five of Anderson County, 294 S.C. 530, 366 S.E.2d 47 (1988), the Court of Appeals held that the statute of limitations is not a defense listed under Rule 12(b), SCRPC, that may be raised by a pre-answer motion. Therefore, based on the McLendon and Glenn cases, the Commission’s denial of Duke’s Motion to Dismiss for lack of subject matter jurisdiction based on Duke’s assertion of the statute of limitations was correct. The statute of limitations defense is not an appropriate basis for a motion to dismiss for lack of subject matter jurisdiction. Therefore, the Commission finds no error in denying Duke’s Motion to Dismiss for lack of subject matter jurisdiction where the basis for asserting lack of subject matter jurisdiction was the statute of limitations having run. As the Commission noted in Order No. 2000-816, Duke may plead the statute of limitations as an affirmative defense. (Order No. 2000-816, p. 10, ¶ 4.)

### **CONCLUSION**

The object of pleading is to advise the parties of the issues they will be called upon to meet and to give them time and opportunity to prepare for trial. Whittredge v. Buckley, 201 S.C. 268, 22 S.E.2d 720 (1942). In Order No. 2000-816 where the Commission denied the Motion to Dismiss filed by Duke, the Commission found that the Complaint filed by Borg-Warner sets forth sufficient facts to allege an actionable claim and also found that the Commission has subject matter jurisdiction over the claim asserted in the Complaint. Based upon the discussions set forth above, the Commission concludes that Duke’s Petition for Reconsideration and/or Rehearing regarding

Commission Order No. 2000-816 does not present any founded allegation of error.

Therefore, the Commission denies Duke's Petition for Reconsideration and/or Rehearing.

IT IS THEREFORE ORDERED THAT:

1. The Petition for Reconsideration and/or Rehearing filed by Duke is denied.
2. This Order shall remain in full force and effect until further Order of the Commission.

BY ORDER OF THE COMMISSION:

  
Chairman

ATTEST:

  
Executive Director

(SEAL)